AMANAH MERCHANT BANK BHD. (FORMERLY KNOWN AS AMANAH-CHASE MERCHANT BANK BHD.)

v.

LIM TOW SENG & 3 ORS.

HIGH COURT, KUALA LUMPUR
DATO' SITI NORMA YAAKOB J.
[CIVIL SUIT NO. D2-23-1218-88]
12 APRIL 1993

PRACTICE AND PROCEDURE: Guarantee agreement providing for service of demand notice by normal post - Service effected by way of AR registered post - AR card not returned - Whether cause of action defective - Whether defendant barred from raising at the trial issues not raised in O.14 application - Defendant not giving evidence - Whether right to infer that defence is mala fide.

GUARANTEE: Director standing as guarantor for loans made to borrowers - Fixed term facility - Extensions granted by bank - Loan utilised during extended period - Whether extensions were the grant of a new facility - Whether guarantee covers extended period - Whether director liable.

The second defendant was sued under a guarantee he had executed in favour of the plaintiff in return for the plaintiff granting a Revolving Bankers Acceptance Facility (the facility) to a group of companies of which the second defendant was a director. Upon the borrowers defaulting in their repayment, the plaintiff sought to enforce the guarantee.

The second defendant resisted the claim on the grounds that during the currency of the facility the borrowers incurred no liability. The second defendant contended that since the liability was only incurred upon the extension of the facility by the plaintiff, the guarantee which only applied to the initial period of the facility could not be used to attach liability to him.

The second defendant further contended that the plaintiff had no cause of action on the grounds that the plaintiff had failed to prove that the notice of demand required to be served under the guarantee agreement had in fact been received by him and as such his liability under the guarantee had not attached. It was not disputed that the letter of demand was not posted in compliance with clause 17 of the guarantee but was instead sent by AR registered post. The AR card was never returned to the plaintiff.

The plaintiff was of the view that since the second defendant had not pleaded that he did not receive the letter of demand and had chosen not to lead any evidence in Court, an unfavourable inference should be drawn that the defence was not *bona fide*. The plaintiff further contended that such a defence was not available since the second defendant chose not to rely on it during the earlier O.14 proceedings and that in any event the demand was deemed to be served, placing reliance on the saving provisions of clause 17 of the guarantee. The plaintiff further sought to read clause 1 and clause 8 of the guarantee together the effect of which would have been to make demand unnecessary as the second defendant would be deemed to have waived the requirement of demand.

Held:

[1] There was no evidence to show that the facility granted after the expiry of the initial period was a fresh facility. PW1, PW2 and PW3, the officers of the plaintiff, testified that the facility granted after that date was the same facility but renewed for a period of time as empowered by clause 5 of the agreement. The very fact that the borrowers utilised the facility during the currency of the second temporary approval without question lends further support to the conclusion that the facility was not a fresh facility but the same facility renewed for the benefit of the borrowers.

[2] The guarantee executed by the second defendant was a continuing guarantee and it covered all liabilities incurred by the borrowers not only during the currency of the original facility but also during the currency of subsequent renewals of the same facility.

[3] By denying paragraph 4 of the amended statement of claim which pleaded that a demand for payment was made to the second defendant, the second defendant had raised an issue on the letter of demand itself and the burden was on the plaintiff to prove that such a notice had been sent to and received by the second defendant.

[4] Sending a letter by AR registered is greater and not lesser than sending it by ordinary post as the postman must obtain an acknowledgment of receipt on the AR card in the case of the former but not in the case of the latter. It is only upon the return of the AR card with the acknowledgment of receipt that it can truly be

said that the letter of demand has been effectively served on the guarantor. Anything short of that can never amount to the letter of demand having been served on the guarantor where posting is done through AR registered post. The saving provisions of clause 17 of the of the guarantee was only good for notices sent by the agreed mode of service, namely by ordinary post.

[5] No unfavourable inference can be drawn against a defendant electing not to give evidence which is a right exclusively his to exercise particularly so in a case where there is an allegation that a cause of action has not been made out and the fact that the plaintiff is denied a chance to cross-examine him does not afford a right to infer that his defence is *mala fide*.

[6] At the O.14 stage the defendant need only raise one triable issue acceptable to the Court to enable him to defend the suit. The fact that the issue of demand was not raised at the O.14 proceedings did not debar the second defendant from relying on it at the trial so long as he had made an issue of it in his pleadings.

[7] Clause 8 did not apply to the waiver of the demand to pay which had been expressly agreed to in clause 1 and since the guarantee was the plaintiff's own document, they could not now say that the guarantee was ambiguous as a means of avoiding their primary obligation under the guarantee.

[Plaintiff's claim against second defendant dismissed with costs].

Cases referred to:

United Prime Corporation Bhd. v. Q-Built Construction (M) Sdn. Bhd. & 3 Ors. [1987] 1 CLJ 501 ***(refd)***

Mok Hin Wah & Ors. v. United Malayan Banking Corp. Bhd. [1987] 2 MLJ 610/[1987] 2 CLJ 197 ***(refd)***

Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v. Kwong Yik Bank Bhd. [1989] 3 MLJ 155 ***(refd)***

MBf Finance Bhd. v. Hasmat Properties Sdn. Bhd. & Ors. [1990] 1 MLJ 180/[1990] 1 CLJ 106 ***(refd)***

The Co-operative Bank Ltd. v. Dato' Seri Mohd. Adib Mohd. Adam (unreported) ***(refd)***

Public Bank Bhd. v. Rasatulin Holdings Sdn. Bhd. & Ors. [1989] 1 MLJ 47 ***(foll)***

Legislation referred to:

Rules of the High Court 1980, O. 14

For the plaintiff - Benjamin Dawson; M/s. Nik Hussain & Partners

For the second defendant - Su Tiang Joo; M/s. Cheah Teh & Su

JUDGMENT

Siti Norma Yaakob J:

The trial of this suit is confined to the 2nd defendant (the defendant) and he is sued under a guarantee dated 3 October 1984, at AB4-7 pursuant to which he undertook to pay the plaintiff all sums due under a Revolving Bankers Acceptance Facility (the facility) granted by the plaintiff to Emporium & Supermarket Holdings Bhd., its subsidiaries and associated companies (the borrowers). The defendant was a Director of the borrowers at the material time and under clause 1 of the guarantee at AB4, his liability is limited to RM2 million, the amount that is claimed by the plaintiff in this suit following the default of the borrowers to make payment of the sum due under the facility.

The defendant strongly resists the claim and has raised 2 defences:

(1) that it has nothing to do with the guarantee he had executed, and
(2) that the plaintiff have no cause of action against him.

The granting and acceptance of the facility is evidenced by a Bankers Acceptance Agreement dated 20 September 1984, at AB1-3 (the agreement), executed by the plaintiff with the borrowers. Under clause 5 of the agreement at AB1, a RM2 million facility was available to the borrowers for a period of one year commencing from 12 June 1984, until 11 June 1985, and thereafter it can be renewed for further periods as shall be mutually agreed between the plaintiff and the borrowers.

The evidence led by the plaintiff's officers, PW1, PW2 and PW3 shows that just one day before the facility expired on 10 June 1985, the Chief Executive of the plaintiff Bank through AB128-129 gave a temporary approval extending the availability of the facility for 3 months to commence from 12 June 1985 to 11 September 1985. This was very much an internal matter and it was done unilaterally without any request from the borrowers for an extension. The plaintiff's reason for doing so was to maintain the good banker and customer relationship which the

plaintiff had with the borrowers then. The plaintiff also explained that a temporary approval as opposed to a formal extension was granted at that time as there was a backlog of accounts to be reviewed by the plaintiff's Executive Committee. In any event, before the expiry of the 3 months temporary period and on 22 August 1985, the plaintiff formally approved an extension of the facility for one year to take effect from 22 August 1985, to 22 August 1986. This is followed by a letter from the plaintiff dated 23 August 1985, at AB16-17, informing the borrowers of the extension and this was duly accepted by the borrowers as seen from their acknowledgment at AB17.

After 22nd August, 1986, 2 further temporary extensions for the duration of 3 months each were approved by the Chief Executive of the plaintiff Bank to take effect from 22 August 1986, to 21 November 1986, and from 21 November 1986, to 20 February 1987. This is evidenced by AB112-117. After 20 February 1987, no further extensions, temporary or otherwise, were granted by the plaintiff as by that date the borrowers were already in default.

The plaintiff also explained that unlike the previous extension when the first temporary extension was granted followed by a formal extension of one year, the same procedure was not adopted after the second temporary extension was granted as the borrowers had failed to submit their audited accounts to the plaintiff in compliance with clause 7 of the agreement at AB2. Hence only a third temporary extension of 3 months was granted after the second temporary extension expired on 21 November 1986. From this evidence it is clear that there was no break in the availability of the facility as it was continued from 11 June 1985, to 20 February 1987, when it was discontinued altogether.

There is also evidence to show that the borrowers utilised the facility during the currency of the one year extended period, thereby incurring a liability amounting to RM322,000 and another RM1.678 million during the currency of the second temporary approval. For this purpose, the plaintiff rely on P10, the borrowers' statement of account prepared by the plaintiff in pursuance to clause 6 of the guarantee, the conclusive evidence clause at AB5.

It is the defendant's contention that his liability under the guarantee is only limited to the indebtedness incurred by the borrowers during the currency of the agreement and in accordance with clause 5 of the agreement, that is, for the period 12 June 1984, to 11 June 1985. He further contends that the further extensions granted by the plaintiff and covering the period 12 June 1985, to 20 February 1987, are in respect of fresh facilities granted by the plaintiff to the borrowers for which fresh letters of guarantee should have been executed by him if he is to be made liable for the borrowers' indebtedness during the extended periods. Since the borrowers incurred no liability during the period 12 June 1984, to 11 June 1985, and the guarantee he executed was only meant to cover that period, he is not liable to meet the plaintiff's demand for a sum of money incurred by the borrowers after 12 June 1985. He maintains that the guarantee is not only limited by amount but also by time.

Clause 5 of the agreement empowers the plaintiff acting mutually with the borrowers to renew the facility for further successive periods after 11 June 1985. This was done by the plaintiff, although they had proceeded to do so initially on their own accord but any notion that they had done so in contravention of clause 5 is dispelled by the subsequent conduct of the borrowers in accepting the renewals and utilising the facility during the currency of the renewals. The 2nd defendant, as the Director of the borrowers, acknowledged the one-year renewal from 23 August 1985, to 22 August 1986, and this is further confirmed by their resolutions at AB18-26. In his capacity as the Director of the borrowers, he must have been fully aware that the facility was utilised during the renewed periods. As such, he cannot now claim that there was no "mutuality" as far as the renewals are concerned.

All the three Bank officers testified that all the renewals were extensions of the facility and were not fresh facilities granted to the borrowers. For this contention the plaintiff rely on AB16-17, their letter notifying the borrowers that the facility was made available to them "for a further period of 1 year up to 22 August 1986", upon the same terms and conditions contained in the agreement subject always to the plaintiff's right to recall the facility on demand.

The first objection taken on this letter is what the defendant says is the introduction of a new term namely the plaintiff's right to recall on demand which, he argues, is not found in the

agreement and this confirms that the facility granted was a fresh facility altogether which is not covered by the guarantee he signed.

I consider there is no merit to this objection as clause 9 of the agreement at AB3, does empower the plaintiff with the right to recall the facility on demand and when AB16 makes mention of it, it was not intended to introduce a new term for the renewed facility but only to emphasise the plaintiff's remedy for default as contained in clause 9 of the agreement.

There is also evidence to show that the borrowers tendered certified copies of their resolutions at AB18-26, accepting the renewal of the facility for the period 23 August 1985, to 22 August 1986. It was during this period too that the borrowers incurred the debt of RM322,000 Since no similar resolutions were tendered by the borrowers accepting the renewals of the facility during the 2 periods of temporary approvals after 22 August 1986, the defendant maintains that, if at all, he is only liable for the debt of RM322,000 and not for RM1.678 million, as the latter sum was incurred during the second temporary approval.

Here again I see no merit to the defendant's argument as there is no evidence to show that the facility granted after 22 August 1986, was a fresh facility. On the contrary, there is evidence from PW1, PW2 and PW3 who testified that the facility granted after that date was the same facility but renewed for a period of time as empowered by clause 5 of the agreement. Added to this is the glaring evidence that there was no break in the availability of the facility after the first expiry date of 11 June 1985, but that it continued until 20 February 1987, when it was discontinued altogether. The very fact that the borrowers utilised the facility during the currency of the second temporary approval without question lends further support to the conclusion that the facility was not a fresh facility but the same facility renewed for the benefit of the borrowers. To that end as the guarantee executed by the defendant is a continuing guarantee, it covers all liabilities incurred by the borrowers not only during the currency of the original facility but also during the currency of subsequent renewals of the same facility.

The guarantee executed by the defendant is an "on demand" guarantee and under clause 17 at AB7, any notice of demand shall be served on him either personally or by sending such notice through the post in an envelope addressed to his last known place of address and a notice so served shall be deemed to be served on him the day following that on which the notice was posted.

It is not disputed that the letter of demand dated 4 March 1988, AB124-125, was not posted in compliance with clause 17 of the guarantee but instead it was sent by AR registered post. The Postal Authorities at AB126 acknowledged receipt of the letter of demand for service on 9 March 1988, but the AR card was never returned and this has provided the defendant with the defence that the plaintiff had no cause of action against him as the notice of demand had not been effectively served on him.

The first objection taken by the plaintiff on this defence is that since the defendant had not pleaded that he did not receive the letter of demand in his statement of defence and coupled with the fact that he chose not to lead any evidence in Court, I should not give any consideration to his defence but should instead draw an unfavourable inference that his defence is not *bona fide*.

By paragraph 4 of the amended statement of claim, the plaintiff have pleaded that a demand for payment was made to the defendant through their solicitors' letter dated 4 March 1988. This plea has been specifically replied by paragraph 12 of the statement of defence by the defendant denying paragraph 4 of the amended statement of claim and putting the plaintiff to strict proof of such a demand.

By so pleading, I consider that the defendant has raised an issue on the letter of demand itself and the burden is on the plaintiff to prove that such a notice had been sent to and received by the defendant. The fact that the defendant had not specifically pleaded that he did not receive the letter of demand makes no difference and carries no weight to the plaintiff's burden of proof that such a notice had been effectively sent. Since the essence of the plaintiff's claim is founded on the guarantee, it is incumbent upon the plaintiff to prove that such a notice had been effectively sent and received. It is also for this very reason that I cannot arrive at any unfavourable conclusion by the defendant electing not to adduce any evidence in Court. It is a right which is exclusively his to exercise, particularly so when there is in this case an allegation that a cause of action had not been made out

against him and the fact that the plaintiff are denied a chance to cross-examine him does not afford me with the right to infer that his defence is *mala fide.*

Another objection taken on this defence is that such a defence was available to the defendant in the earlier O. 14 proceedings but since he chose not to rely on it, he is debarred from doing so at his trial.

I do not consider that there is any merit to this objection as at the O. 14 stage, the defendant need only raise one triable issue acceptable to the Court to enable him to defend this suit. As such the fact that the issue of demand was not raised at the O. 14 proceedings does not debar the defendant from relying on it at the trial for so long as he had made an issue of it in his pleadings. This he has done through paragraph 12 of his statement of defence.

The plaintiff also maintains that the letter of demand had been correctly addressed to the defendant and since neither the letter nor the AR card had been returned, by the saving provisions of clause 17 of the guarantee, the notice is deemed to have been received by the defendant on 10 March 1988, a day after the postal authorities acknowledged receipt of the letter for service. This argument would stand if the letter of demand had been sent by ordinary post as the saving provisions of clause 17 are only good for notices sent by ordinary post. As I had stated earlier, this agreed mode of service was not adopted by the plaintiff but they took on the added responsibility of sending the letter of demand by AR registered post instead.

A number of authorities were cited as to the meaning of the word "post", the difference between ordinary post and registered post and the presumption of receipt, but I consider all the cases are irrelevant as the present case deals with AR registered post.

A number of other authorities were also relied on which emphasised the need for a cause of action to be established against a guarantor by the effective service and receipt of a letter of demand. I make the following observations on these cases.

United Prime Corpn. Bhd. v. Q-Built Construction (M) Sdn. Bhd. & 3 Ors. [1987] 1 CLJ 501, *Mok Hin Wah & Ors. v. United Malayan Banking Corpn. Bhd.* [1987] 2 MLJ 610 and *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v. Kwong Yik Bank Bhd.* [1989] 3 MLJ 155, all held that carbon copies of the letters of demand sent to the guarantors cannot constitute proper or effective demands under the "on demand" guarantees they executed even though they, as Directors of the borrowers, had actual notice of such demands.

MBf Finance Bhd. v. Hasmat Properties Sdn. Bhd. & Ors. [1990] 1 MLJ 180, dealt, *inter alia,* with a notice of demand sent by AR registered post to one of the guarantors contrary to what was stipulated in the guarantee, namely that the written demand or request be sent by registered post to the guarantors' respective addresses or delivered by hand to the guarantors personally at their last known place of residence. Abdul Malek J held that in the absence of the AR card, the letter of demand was not served on one of the guarantors.

In the unreported case of *The Co-operative Bank Ltd. v. Dato' Seri Mohd. Adib Mohd. Adam,* the loan agreement specifically provides that a letter of demand is deemed to have been served if sent by registered post notwithstanding that it be undelivered or returned undelivered. The letter of demand was instead sent by AR registered post and the AR card was not returned, and it was argued that the demand was ineffective. Dato' V.C. George J held that on the principle of the greater including the lesser, sending the letter by AR registered post is a more sophisticated version of the ordinary registered post and that it falls within the deeming provision of the loan agreement.

On the facts of the case before me, I consider that sending a letter by AR registered is "greater° and not "lesser" than sending it by ordinary post as the postman must obtain an acknowledgment of receipt of the letter on the AR card in the case of the former but not in the case of the latter. It is only upon the return of the AR card with the acknowledgement of receipt that it can truly be said that the letter of demand has been effectively served on the guarantor. Anything short of that can never amount to the letter of demand having been served on the guarantor where posting is done through AR registered post.

Perhaps the only case which falls on all fours with the instant case is that decided by me in *Public Bank Bhd. v. Rasatulin Holdings Sdn.*

Bhd. & Ors. [1989] 1 MLJ 47, when I had held that to constitute a proper demand, the burden is on the plaintiff to prove that the AR card is returned duly acknowledged.

Likewise, as this burden has not been discharged by the plaintiff, I consider that the plaintiff has not been able to establish a cause of action against the 2nd defendant under the guarantee and on that finding the plaintiff's claim must fail.

Lastly, I come to the plaintiff's contention that the written demand as stipulated in clause 1 of the guarantee at AB4 must be read together with clause 8 at AB5, the effect of which is to make such demand unnecessary as the defendant has waived the requirement of demand.

Here again, I see no merits to the plaintiff's contention, as clause 8 is limited to specific waivers of demand covering the following matters:

(1) Refusal for further credit to the borrowers.
(2) To terminate the facility.
(3) To grant time or indulgence.
(4) To accelerate maturity of obligation, that is, to shorten period of availability of credit or renew credit.

Clause 8 does not apply to the waiver of the demand to pay which has been expressly agreed to in clause 1 and since the guarantee is the plaintiff's own document, they cannot now say that the guarantee is ambiguous as a means of avoiding their primary obligation under the guarantee.

As the plaintiff has failed to establish a cause of action against the 2nd defendant, I accordingly dismiss their claim with costs.

CHAI THEN SONG

v.

MALAYAN UNITED FINANCE BHD.

HIGH COURT, JOHOR BAHRU
DATO' JAMES FOONG J
[CIVIL APPEAL NO. 11-10 OF 1989]
5 APRIL 1993

CONTRACT: Deed of Guarantee - Relevant particulars left blank at the time of execution - Particulars subsequently filled in - Whether Deed of Guarantee valid.

The appellant, in order to induce his client to purchase a tractor, stood as guarantor on a hire purchase agreement entered into between his client and the respondent. The purchaser defaulted on his installments and the respondent repossessed the tractor, sold it and claimed the balance due from the appellant pursuant to the Deed of Guarantee.

It was not disputed that the Deed of Guarantee, when executed, was a printed form with relevant particulars left blank which were subsequently filled in. The appellant disputed the validity of the Deed of Guarantee on the grounds that the fundamental elements of the formation of a contract had not been fulfilled.

The trial Magistrate found in favour of the respondent and the appellant appealed.

Held:

[1] A person who chose to be careless, or not bothered to find out the contents of a document, or who relied completely upon others to complete the same, is responsible for his own actions and he is prevented from denying that the contents of the document do not bind him.

[2] The appellant never denied that he executed the Deed of Guarantee nor did he deny that the terms therein were not the terms agreed upon by him. Though the relevant particulars of the Hire Purchase Agreement and the Deed of Guarantee was at the time of execution left blank, as the appellant permitted others to fill in the particulars of both these documents, he must accept full responsibility for his actions.

[Appeal dismissed with costs].